

**Letter of Findings: 04-20110331**  
**Sales and Use Tax**  
**For the Years 2007, 2008, and 2009**

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**ISSUE**

**I. Sales and Use Tax – Imposition.**

**Authority:** IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-2.5-5-1 et seq.; IC § 6-8.1-3-12; IC § 6-8.1-5-1; IC § 6-8.1-5-4; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dep't. of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96 (Ind. Ct. App. 1974).

Taxpayer protests the assessment of sales/use tax on its sales of tangible personal property.

**STATEMENT OF FACTS**

Taxpayer is an Indiana limited liability company (LLC), which sells tangible personal property to customers inside and outside of Indiana. The Indiana Department of Revenue ("Department") conducted a sales/use tax audit for tax years 2007, 2008, and 2009. Taxpayer and the Department agreed to utilize statistical sampling to determine the total amount of Taxpayer's additional sales tax due for those years. The statistical sampling projection resulted in no (zero) additional sales tax liability for 2007, but approximately \$6,300 additional sales tax due for 2008 and 2009. The Department also found that Taxpayer purchased and used certain tangible personal property without paying sales tax or self-assessing use tax during tax year 2009. As a result, the Department's audit assessed additional sales and use tax for tax years 2008 and 2009.

Taxpayer timely protested the assessments of sales tax for tax years 2008 and 2009 only and submitted additional documentation to support its protest. A hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

**I. Sales and Use Tax – Imposition.**

**DISCUSSION**

Based on the statistical sampling projection result, the Department's audit assessed Taxpayer additional sales tax for 2008 and 2009 (the "Tax Years at Issue"). Taxpayer, to the contrary, claimed that the sampling projection result was not correct and it was not responsible for the sales tax assessed.

As a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). A person who acquires property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). There are exemptions available for sales tax. IC § 6-2.5-5-1 et seq. A statute which provides a tax exemption, however, is strictly construed against the taxpayer. Indiana Dep't. of State Revenue, Sales Tax Division v. RCA Corp., 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). "[W]here such an exemption is claimed, the party claiming the same must show a case, by sufficient evidence, which is clearly within the exact letter of the law." *Id.* at 100-101.

Indiana imposes a sales tax on retail transactions. IC § 6-2.5-2-1 states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

IC § 6-2.5-4-1, in pertinent part, states:

- (a) A person is a retail merchant making a retail transaction when he engages in selling at retail.
- (b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:
  - (1) acquires tangible personal property for the purpose of resale; and
  - (2) transfers that property to another person for consideration.
- (c) For purposes of determining what constitutes selling at retail, it does not matter whether:
  - (1) the property is transferred in the same form as when it was acquired;
  - (2) the property is transferred alone or in conjunction with other property or services; or
  - (3) the property is transferred conditionally or otherwise.

Accordingly, Taxpayer is a retail merchant and, therefore, is responsible for collecting and remitting the sales tax.

IC § 6-8.1-3-12(b) states:

The department may audit any returns with respect to the listed taxes **using statistical sampling. If the taxpayer and the department agree to a sampling method to be used, the sampling method is binding on the taxpayer and the department in determining the total amount of additional tax due or amounts to be refunded. (Emphasis added).**

IC § 6-8.1-5-1(b), in relevant part, states "[i]f the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department. The amount of the assessment is considered a tax payment not made by the due date and is subject to [IC 6-8.1-10](#) concerning the imposition of penalties and interest."

IC § 6-8.1-5-4(a) further provides:

Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. **The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks.**

During the audit period, Taxpayer did not maintain and produce adequate records. The Department's audit noted that, in relevant part, that:

[T]axpayer did not maintain most source records such as sales and purchase invoices. Taxpayer's records were also not organized.... Taxpayer has been advised of the requirements to maintain accurate business records.

...

**In agreement with the taxpayer, audit sampled two average months for each audit period. The Agreement for Projecting Audit Results is incorporated into this audit. (Emphasis added).**

Accordingly, September 2007, October 2007, May 2008, August 2008, September 2009, and October 2009, were selected and fully examined to determine Taxpayer's additional sales tax due for those years. As a result, Taxpayer did not have additional sales tax due for 2007, but for 2008 and 2009, Taxpayer had additional sales tax due, in the total amount of approximately \$6,300. The Department's audit thus assessed additional sales tax based on the sampling projection result.

Taxpayer protested the Department's assessments, stating, in relevant part, that "99.5 [percent] of our business is internet based, [and] we have less than [0.5 percent] walk in traffic." Taxpayer further asserted that it only had two accounts with third-party vendors to process its internet sales: namely, a Paypal account and an AMG Processor account ("Online Accounts"). In addition to copies of its ST-103 forms for tax periods April 2011, May 2011, and August 2011, Taxpayer offered its own recalculation based on its April 2008, September 2008, March 2009, and July 2009 records from its Online Accounts. Taxpayer stated that the copies of its ST-103 forms for tax year 2011 showed that its "taxable sales in Indiana fluctuate from month to month." Taxpayer also stated that the "screen shots" of the Online Accounts for the transactions that occurred during April 2008, September 2008, March 2009, and July 2009 (the "Screen Shots Transactions") showed that it only had limited sales in Indiana for 2008 and 2009. Taxpayer further asserted that its own recalculation based on its records of Screen Shots Transactions resulted in a lower amount of taxable sales. Taxpayer thus argued that the projection result, which the Department's audit used to impose the assessment, was incorrect.

Taxpayer's reliance is misplaced. Upon reviewing Taxpayer's documentation, first, Taxpayer's 2011 returns were beyond the scope of this protest, because Taxpayer disputed the Department's assessments for tax years 2008 and 2009, not 2011. Additionally, Taxpayer's Screen Shots Transactions were sales records outside of the audit sample population. Taxpayer selected its records of April 2008, September 2008, March 2009, and July 2009, but the audit utilized Taxpayer's records of May 2008, August 2008, September 2009, and October 2009 per agreement with Taxpayer. Using a different set of sales records certainly could produce a very different result than the one reached by the audit. However, it did not demonstrate that the audit's projection result was incorrect.

Furthermore, Taxpayer's records of the Paypal Screen Shots Transactions revealed that those selected transactions had no sequential transaction numbers and only contained "date of transaction," "customer's name," "payment status," "fee," and "amount." Without other supporting documentation, such as Taxpayer's sales invoices and/or a sales journal, those selected Screen Shots Transactions cannot be verified. Even if, assuming the selected Screen Shots Transactions could be used to determine Taxpayer's additional sales tax due, without the sequential transaction numbers, it is difficult to ascertain the full cohort of sales for the selected periods. Similarly, Taxpayer's records of the AMG Processor Screen Shots Transactions also revealed random, non-sequential ID numbers (which were assigned by the AMG Processor), which cannot be verified without underlying source documents. Given the totality of the circumstances, especially in light of the agreement between the Department and Taxpayer, in the absence of other documentation to substantiate its claim, the Department is not able to agree that Taxpayer met its burden of proof demonstrating that the proposed assessment is not correct.

Lastly, as mentioned above, during the audit period, Taxpayer and the Department agreed, in writing, to utilize the statistical sampling to project the audit result. Thus, both Taxpayer and the Department were bound by the projection result. Specifically, for the Tax Years at Issue, the sampling population was drawn from Taxpayer's

own records of September 2007, October 2007, May 2008, August 2008, September 2009, and October 2009. There was no tax liability for tax year 2007; additional sales tax liabilities for 2008 and 2009. Neither the Department nor Taxpayer can subsequently argue that the projection result was not correct by using a different set of records just because the initial result was undesirable. An administrative hearing is not the appropriate forum by which to explore statistical variances and methodologies. Both Taxpayer and the Department thus were bound by the projection result pursuant to IC § 6-8.1-3-12(b).

In short, Taxpayer may argue that a different set of sampling population resulted in a less tax liability but it failed to demonstrate the clear error on the part of the audit. Both Taxpayer and the Department agreed to and, therefore, were bound by the projection result pursuant to IC § 6-8.1-3-12(b).

**FINDING**

Taxpayer's protest is respectfully denied.

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